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In the Supreme Court of the United States

OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

JOINT BRIEF OF AMICUS CURIAE COALITION OF MISSOURI HOSPITALS AND HOSPITAL ETHICS COMMITTEES IN SUPPORT OF PETITIONERS

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May 5, 1989

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STATEMENT OF INTEREST

The Coalition of Missouri Hospitals and Hospital Ethics Committees' brief (the "Coalition") is filed jointly on behalf of eleven different health care organizations, from the state of Missouri and elsewhere, who have a strong interest in the *Cruzan* case. The amici represented in the Coalition include:

St. Luke's Hospital of Kansas City Ethics Committee

Trinity Lutheran Hospital Ethics Committee

Independence Regional Health Center Ethics Committee

North Kansas City Hospital

Heartland Health System

McCune Brooks Hospital

Ellett Memorial Hospital

Perry County Memorial Hospital

Center for Health Care Ethics at St. Louis University Medical Center

University of Missouri-Columbia School of Medicine

Biomedical Ethics Committee of Hutzel Hospital—Detroit Medical Center[1]

This diverse Coalition encompasses five major Kansas City area hospitals or their ethics committees, the medical school of Missouri's largest and most prominent state university, the educational center of a Catholic university in St. Louis with enrollment of over 2,000 medical students, three downstate Missouri hospitals and the ethics

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1. The parties to this case have consented to the filing of this amicus brief. The letters providing consent have been filed with the Clerk of this Court.

committee of a large Detroit hospital concerned with ethical issues and the *Cruzan* decision.

The hospitals of the Coalition treat tens of thousands of patients in Kansas City and across Missouri each year. Their ethics committees serve as consultants to families, patients and doctors faced with difficult decisions about medical treatment. The decision of the Missouri Supreme Court in *Cruzan v. Harmon,* 760 S.W.2d 408 (Mo. banc 1988), directly affects the members of the Coalition. *Cruzan* has, in essence, removed doctors, family members and ethics committees from the medical treatment decision about providing fluids and nutrition artificially to an incompetent person. The majority in *Cruzan* ruled that an incompetent patient who loses the natural ability to swallow must receive fluids and nutrition artificially, even if the family objects and the doctor and ethics committee believe such treatment is medically and ethically inappropriate. Pet. App. at A34-A39. The Coalition members believe this rigid, all encompassing rule violates sound medical ethics. Moreover, it has caused widespread confusion and upheaval in hospitals and nursing homes throughout Missouri that no longer know what rights an incompetent patient and his family might have to refuse medical treatment. Likewise, doctors now must live with the growing fear that decisions about medical treatment, which they feel ethically bound to make, could expose them to suit after *Cruzan.*

To give the medical community much needed guidance and to correct the infringement on the rights of patients and the duties of their doctors, the members of the Coalition urge this Court to grant certiorari in this vitally important case.

ARGUMENT

The fundamental cornerstone of ethical health care is that the patient has the right to consent to or withhold consent to medical treatment. When a patient falls incompetent and is thus incapable of giving or withholding consent, then traditionally doctors have consulted with the patient's family to make medical treatment decisions. *See* Resolution No. 14 of the Missouri State Medical Association, adopted April 15, 1989 (hereinafter "MSMA Resolution") (Appendix A); *see also Cruzan v. Harmon,* Pet. App. at A47-A48 (Blackmar, J., dissenting). Such a decision-making process protects the fundamental role of the family in making extremely personal and private family decisions. *Id.; see also Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 773, 781 n.11, 785 (1986) ("there is a 'realm of family life which the state cannot enter. . .' "). The process also provides the best method for determining what an incompetent person would want, as closely as such a determination can be made. The Supreme Court of New Jersey provides a good example of courts that have recognized this special relationship of families:

> "Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also because of their special bonds with him or her. Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they who provide for the patient's comfort, care, and best interests (citations omitted), and they who treat the patient as a person, rather than a symbol of a cause."

In re Jobes, 529 A.2d 434, 445 (N.J. 1987). Leading medical groups also recognize that the loving family of an

incompetent patient should make the medical treatment decisions about their family member, in conjunction with the doctor, and ethics committee, if available. *See, e.g.*, American Medical Association, Principles of Medical Ethics 2.18 (1986) ("the choice of the patient, *or his family* . . . if the patient is incompetent must prevail").

Indeed, the Missouri State Medical Association ("MSMA") adopted by a virtually unanimous vote on April 15, 1989, a resolution which specifically and forcefully disapproves of "the State" rather than "the family" attempting to make decisions about the provision of artificial nutrition and hydration for an incompetent person *See* MSMA Resolution, Appendix A. The MSMA found such state interference a threat to "our citizens' right of self-determination." *Id.* The timing of this strong pronouncement from the MSMA cannot be wholly coincidental. The decision of the 4-3 majority in *Cruzan* is an unprecedented usurpation of the rights and duties of patients and their families and doctors. The only question is how far *Cruzan* reaches. Clearly, incompetent patients like Nancy Cruzan, with artificial feeding devices already in place, do not have a right to removal of those devices.[2] Pet. App. at A34-A39. Further, the majority opinion appears to hold that a person who becomes incompetent after *Cruzan,* and who also loses the ability to swallow, *must* submit to the insertion of a gastrostomy tube, even if the doctor and parent/guardian object. *See* Pet. App. at A39 (guardian has "express, affirmative duty . . . to give consent" to medical treatment and

2. An incompetent who executed clear advanced directives before becoming incompetent is an exception to this rule. *See* Pet. App. at A41. But it is the experience of the Coalition members that very few people have executed a living will or any other advanced directive.

has no authority "to order the termination of medical treatment").[3]

The Coalition believes that the substitution of the State into the traditional roles of the doctor and family of the incompetent patient is contrary to sound medical practice and that the problem will only grow. For example, roughly half of the cases that come before the ethics committee members of the Coalition involve the question of withholding or withdrawing artificial fluids and nutrition from incompetent patients. Many of these patients are elderly. As medical science advances, we improve and increase the technological ability to keep people alive longer. The Coalition members, and hospitals and doctors across Missouri, need guidance as to what right these patients retain. The decision of the Missouri Supreme Court in *Cruzan* does not provide that guidance.

3. In accord with the MSMA Resolution and the conclusions of the American Medical Association and all other leading medical groups, the Coalition members believe that gastrostomy tube feeding is a medical treatment that a patient or his parent or guardian has a right to choose to forego. *See, e.g.*, MSMA Resolution, Appendix A.

CONCLUSION

For all of the foregoing reasons, these amici respectfully urge this Court to review this vitally important case.

Respectfully submitted,

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May 5, 1989

APPENDIX

MISSOURI STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES

Resolution #14
(A-89)

Introduced by:

Cape Girardeau County Area Medical Society

Subject:

Right to Forego Life Support

Referred to:

Reference Committee on Constitution and Bylaws

WHEREAS, the decision to withdraw *artificial* hydration and/or nutrition (*tube feeding*) from terminally ill or *irreversibly* comatose patients *should be allowed when directed by the patient, family, medical proxy, or by* prior "*Living Will*" declaration of the patient; and

WHEREAS, Section 459.010(*3*) of the "Missouri Declaration on Life Support (Living Will)" prohibits withdrawal of artificial nutrition/hydration and is clearly an infringement upon the rights of the individual by the State of Missouri; and

WHEREAS, many states along with the President's Commission on Biomedical Ethics (1983) have favored "Health Care Surrogate" legislation over "Living Will" laws (459.010-459.030) to preserve patients' right of self-determination when decision making capacity is lost; therefore, be it

RESOLVED, that the Missouri State Medical Association calls upon the Legislature of the State of Missouri to delete *the phrase in* section 459.010*(3)* of the "Missouri Declaration on Life Support" which defines providing *artificial* hydration or nutrition *(tube feeding)* as "not being a death-prolonging procedure"; and be it further

RESOLVED, that the Missouri State Medical Association supports additional legislation which affirms the rights of Missouri citizens to appoint a "Health Care Surrogate". This individual(s) could be chosen by a competent patient to act as his/her medical proxy making health care decisions when patient decision making capacity is lost. Such duly appointed medical proxies should have power to approve or refuse any and all medical treatment, including food and water provided by artificial means (tube feeding), when the burdens of such treatment outweigh the benefits and/or such treatment would violate the wishes of the patient as known by the proxy. Missouri physicians therefore support prompt legislative approval of a Health Care Surrogacy Act or its equivalent to help insure our citizens' right of self-determination; and be it further

RESOLVED, upon passage of satisfactory health care surrogate legislation and deletion of the restrictive phrase in Section 459.010(3), MSMA will support and publicize the value of such legislative changes to Missouri citizens and to physicians and health related professions; and be it further

RESOLVED, that ethical decisions *such as the right to refuse treatment* be left to the individual, *family and/or Health Care Surrogate, and* not to the State.